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Juan E. Méndez

Salvador Tinajero-Esquivel

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The Cavallo Case: A New Test for Universal Jurisdiction

by Juan E. Méndez and Salvador Tinajero-Esquivel*

Mexico's federal judiciary, and eventually its Supreme Court, will soon have to decide whether the incorporation of human rights treaties into domestic law allows (or indeed mandates) the extradition of a suspect to a state exercising extra-territorial criminal jurisdiction over alleged violations of crimes against humanity. The dramatic legal developments of the *Pinochet* case are being played out again. This time, however, it is Mexico, and not the United Kingdom, that must decide novel issues of how to give effect to treaty obligations designed to foster cooperation in the struggle to end impunity for the most serious human rights violations. The outcome will have far reaching implications for Mexico, a country that, until its recent transition to a newly democratic regime, the international community noted for its steadfast defense of sovereignty as a barrier to international concerns for human rights.

Beyond that, the case is an early test of the somewhat schizophrenic position of Latin American democracies on this matter. Many of these countries have proclaimed their adherence to international human rights treaties, and some have even included these principles in their constitutions. Many Latin American countries have taken other important steps toward taking their international human rights obligations seriously. Yet when former Chilean dictator Augusto Pinochet was arrested in London on October 16, 1998, Latin America rallied behind Chile in public

The decision is a very important precedent in the application of universal jurisdiction and represents the first time that a Mexican tribunal has accepted the validity of this concept.

opposition to any notion of extra-territorial criminal jurisdiction. If, however, Mexico's Supreme Court supports the Foreign Affairs Ministry's decision to extradite Ricardo Miguel Cavallo, an Argentine citizen, to a Spanish court that seeks to prosecute him for his role in Argentina's "dirty war" of the 1970s, this decision could signal a shift in other Latin American countries toward greater acceptance of the principle of universal jurisdiction. The universal jurisdiction doctrine allows any country to initiate investigations and prosecutions of certain international crimes, regardless of the nationality of the parties or the locus of the crime.

Background to the Charges of Massive and Systematic Human Rights Violations

Twenty-five years ago, on March 24, 1976, the Argentine Armed Forces overthrew the government of María Estela (Isabel) Martínez de Perón. The armed forces assumed total control through a military *junta* formed by the commanders-in-chief of the army, navy, and air force. From the start, they instituted a comprehensive "war against subversion" designed to quell the country's political violence by annihilating the then-active urban guerrilla organizations. The program led to severe institutional changes that allowed the *junta* to detain thousands of persons for many years without trial; to institute courts martial to try civilians; and more generally, to abolish the independence of the judiciary and replace most judges with loyal and subservient partisans of the new order. The new system also brought about harsh treatment of even mildly dissident voices in the press and civil society.

Much worse, however, were the clandestine features of the repressive system. Through a series of internal orders, the armed forces monopolized the use of force and controlled not only the

police and security forces, but also the deadly paramilitary groups Perón had allowed to flourish as a counterweight to the leftist guerrillas. The armed forces organized Task Forces combining personnel from all security forces under the direction of intelligence groups in the army, navy, and air force. These task forces disappeared tens of thousands of Argentines without issuing arrest warrants or acknowledging such activity. The Task Forces arrested victims and took them to clandestine torture and detention centers where they were completely denied access to judges or other civilian authorities. The navy ran the most notorious detention center in the Naval Mechanics School (Escuela de Mecánica de la Armada, ESMA) in Buenos Aires, under the command of Admiral Emilio Massera, the former commander-in-chief of the navy and a member of the *junta*. An estimated 4,000 persons passed through ESMA. Some of these persons were eventually "legalized" and sent to the regular prison system. A much smaller number of persons survived by cooperating, or pretending to cooperate, with the Task Forces. The vast majority of persons that entered ESMA, however, never reappeared. These persons were killed and their bodies buried in clandestine graves or thrown out of navy airplanes into the sea.

According to the indictment issued by the Spanish Court, Ricardo Miguel Cavallo, also known by the pseudonyms "Miguel Angel Cavallo," "Serpico," or "Marcelo," was part of ESMA's Task Group 3.3.2. The procedures used by ESMA Task Group 3.3.2 included, among others, kidnapping specific targets, torture, murder, disappearances, servitude, and selection of prisoners for "recovery," a practice designed to recruit persons thought to have betrayed their former friends. These recruits were intended to form the base of a political party to launch Admiral Massera's political ambitions. Cavallo served in the intelligence sector of ESMA from 1976 until early 1979, when he became responsible for kidnapped people who were in the process of "recovery." According to the indictment and survivors, Cavallo was a "*Capitan de Corbeta*," a relatively high-ranking position in ESMA, ultimately under Massera's command. Cavallo, in addition to committing torture himself, made operational decisions such as identifying targets for torture. He also contributed to the decisions of his superiors regarding the final disposition of the victims.

Transition to Democracy, Investigations, Prosecutions, and Eventual Impunity

In the 1983 Argentinian presidential election, Raúl Alfonsín, a democrat running on a platform of truth and justice for the human rights violations of the recent past, won a surprising victory. Alfonsín formed one of the hemisphere's earliest truth commissions—the National Commission on the Disappeared (CONADEP)—which conducted a thorough investigation despite the armed forces' lack of cooperation. Its report, called *Nunca Mas* (Never Again), documented the systematic nature of clandestine repression and identified many of the clandestine detention and torture centers, including ESMA.

In 1985, the Federal Court of Appeals for Buenos Aires heard an historic case known as the "*juicio a las juntas*" that prosecuted members of the three successive *juntas*. The appeals court convicted five of nine defendants. Admiral Massera was among those convicted for his involvement with ESMA. This landmark decision set the stage for subsequent trials against subordinates of the *junta* members in each jurisdiction, which directly affected officers of Cavallo's rank. These events provoked unrest among the military and forced Alfonsín to enact two laws designed to limit and ultimately terminate prosecutions for officers generally of the rank of colonel and lower.

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Law 23.492, or *Punto Final*, passed in December 1986, foreclosed such prosecutions not initiated within 60-days after its promulgation. The result was a race to the courts by victims, and by the end of that period, more than 400 suspects faced indictments. Tensions erupted in April 1987 when many junior officers, fearing prosecution, revolted in what is known as the *carapintada* uprising. Following this incident, Congress passed Law 23.521, or *Obediencia Debida*, which established that any officer not commanding a territorial division or sub-division (essentially colonels or under), would be presumed *juris et de jure* (by irrebuttable presumption) to have acted in ignorance of the illegality of the orders to kill or torture suspects. Because of his rank, Ricardo Miguel Cavallo was a beneficiary of the *Obediencia Debida*.

The twin operation of these laws forced prosecutors to drop criminal charges against most officers. Less than 30 generals, and their equivalents in other forces, in addition to those already serving sentences as a result of the two earlier trials, remained unaffected by the amnesty laws. In 1989 and 1990, Alfonsín's successor, Carlos Saul Menem, compounded the cycle of impunity by issuing pardons to those generals, whether still under prosecution or already serving sentences.

Modifications of Immunity Laws

In 1996, following the revelations of a defector from ESMA about the practice of throwing captives alive into the sea, the Argentine Supreme Court validated an interpretation of treaty obligations regarding crimes against humanity, and allowed lower courts to entertain petitions under the theory of a "right to truth." As a result, there are now ongoing investigations in several jurisdictions, with broad civil society and bar association participation, attempting to complete the CONADEP report and the trials of the 1980s. Particular attention is being given to the gathering of more proof on the fate and whereabouts of the *desaparecidos* (disappeared).

More importantly, in March 2001, in a case regarding the appropriation of babies (Case No. 8686/2000), Federal Judge Gabriel Cavallo declared the *Obediencia Debida* and *Punto Final* laws unconstitutional as applied to the facts of the case. Judge Cavallo found these laws contrary to Argentina's treaty obligations regarding crimes against humanity and ordered the prosecution of those who had appropriated the children of two disappeared persons, not just for the appropriation of babies, but also for the kidnapping and presumptive murder of their parents. This judgment may open the door for new prosecutions in Argentina. Unfortunately, this interpretation of the law is rather limited not only because it applies solely to the facts of this particular case, but also because the Supreme Court has appellate review.

Action Taken by the Spanish Courts

The unavailability of justice in Argentina, due primarily to the immunity laws of the 1980s and the presidential pardons of 1988 and 1989, prompted victims and relatives of victims to file a case before the *Juzgado Central de Instrucción N° 5* of the *Audiencia Nacional*, a criminal court in Madrid, Spain, under Judge Baltazar Garzón in 1996. The case is based on Spain's criminal jurisdiction law, Article 23, *Ley Orgánica del Poder Judicial de España* (Organic Law of the Judicial Power of Spain), as amended in the 1980s. The law includes one of the most sweeping norms of universal jurisdiction, and opens the doors of Spanish courts to victims of massive and egregious abuse in other lands, provided that in those other lands they have been unable to obtain justice.

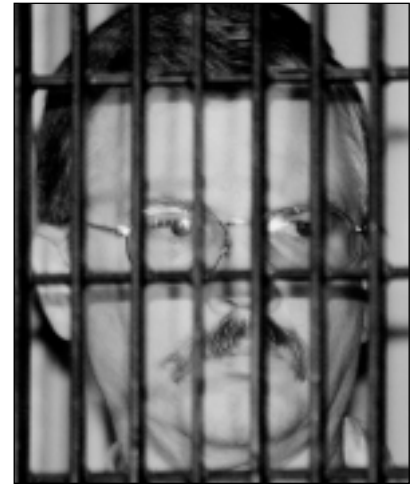
During Garzón's investigation into the human rights abuses in Argentina, Cavallo's name appeared often. Garzón consolidated Cavallo's investigation and others with a parallel case against Pinochet when he obtained evidence of illegal coordination between Southern Cone security forces under Operation Condor. Operation Condor consisted of a well-established plan of repression involving the security forces of Argentina, Brazil, Chile, Paraguay, and Uruguay, whose most enthusiastic proponent was the Chilean dictator. Judge Garzón indicted several individuals accused of crimes against humanity committed in Argentina during the dictatorship. Although Cavallo's name figured in the investigations since July 1998, a warrant was not issued until August 2000 when he was spotted by some of his victims while living in Mexico.

The Extradition Process in Mexico

Ricardo Miguel Cavallo arrived in Mexico in early 2000 as a representative of TALSUD, an Argentine firm that had won a bid to manage a new program established by the Mexican government to organize the National Registry of Vehicles (RENAVE). In Mexico, the RENAVE program was controversial, because it required an additional payment for owning a vehicle, in addition to placing information regarding all vehicles in private hands.

Within this discussion about RENAVE, on August 24, 2000, the Mexican newspaper *Reforma* published an investigation about Cavallo and his military past in Argentina. In the same article, the newspaper reported that many victims of the Argentine repression had recognized Cavallo as the person in charge of the clandestine center where they were detained and, in some cases, as the one who had directed the torture against them. After *Reforma* disclosed the real identity of the person it called Miguel Angel Cavallo, Cavallo denied being Miguel Angel, and claimed his name was Ricardo Miguel. Cavallo also denounced the article as part of a campaign against RENAVE, arguing that obscure mafias would invent stories just to stop the program. He boarded a flight to Argentina the next day, explaining that he intended to clarify the situation regarding his name. The International Criminal Police Organization (INTERPOL) detained him when the plane stopped at the airport in Cancún, Mexico, just before leaving for Buenos Aires.

Cavallo was detained in Cancún without an arrest warrant issued by any court, pursuant to Article 16 of the Mexican Constitution. Article 16 empowers the public prosecutor to detain a person for up to 48 hours without a warrant when there is suspicion of commission of a grave crime and well-founded expectation of a risk of escape. After the publication of the *Reforma*



Ricardo Miguel Cavallo inside a Mexico City jail after a federal judge ordered his arrest in Mexico City.

AP Photo/Victor R. Caivano

Judge Garzón issued this warrant on the same day of Cavallo's detention, on the basis of Cavallo's alleged participation in the crimes of genocide, terrorism, and torture committed in Argentina during the dictatorship.

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article, and because of Cavallo's imminent trip to Argentina, the public prosecutor ordered his detention.

The day Cavallo was detained, the Office of the Attorney General of Mexico asked the 177 member countries of INTERPOL if arrest warrants were outstanding against Cavallo or if he had any criminal record. On August 25, 2000, the Office of the Attorney General received a communication from the Spanish government informing the Mexican attorney general that, after being informed about Cavallo's presence in Mexico, Judge Garzón in Spain had issued an international arrest warrant against Cavallo. Judge Garzón issued this warrant on the same day of Cavallo's detention, on the basis of Cavallo's alleged participation in the crimes of genocide, terrorism, and torture committed in Argentina during the dictatorship. The public prosecutor in Mexico received the Spanish communication within the constitutional period of 48 hours and immediately placed Cavallo before a competent judge to decide whether to extradite him. Therefore, the detention did not violate any Mexican constitutional or legal provisions.

The Extradition Hearing

On January 11, 2001, the Sixth District Judge in Criminal Matters of the First Circuit, a Mexican federal court, issued his opinion regarding Cavallo's extradition to Spain. In an over 700-page judgment (Resolution 5/2000), Judge Jesus Guadalupe Luna Altamirano decided that the extradition should proceed

The judge also held that *Obediencia Debida* and *Punto Final* are contrary to the spirit of the legal rules recognized by the international community and therefore grants of amnesty for such crimes are prohibited.

for the crimes of genocide and terrorism, but not for torture because the statute of limitations created by the Mexican legislature had expired with regard to the alleged torture. The decision is a very important precedent in the application of universal jurisdiction and represents the first time that a Mexican tribunal has accepted the validity of this concept. The judge decided that the Spanish court had jurisdiction based on Article 23 of the Organic Law of Judicial Power of Spain, enacted to prosecute certain crimes regardless of the territory in which they were committed.

The decision relies on Spanish and Mexican constitutional law as well as international law. The judge applied international law using the same rationale as the British House of Lords in the *Pinochet* case, relying on treaties signed and ratified by Spain, Mexico, and Argentina, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), and the International Covenant on Civil and Political Rights (ICCPR). The judge determined that the Spanish prosecution had met the requirement of the Mexico-Spain extradition treaty because the prosecution had proven both the existence of the crimes of genocide, torture, and terrorism committed through kidnappings, forced disappearances, elimination of detainees, reduction to servitude, appropriation of children, falsification of documentation, and operations in foreign countries, and Cavallo's probable responsibility for these crimes.

Analysis of the Argentine Amnesty Laws

One of the most important issues decided by Judge Luna was the validity of the Argentine amnesty laws, *Obediencia Debida* and *Punto Final*. The judge determined that these laws have no legal effect internationally because they are contrary to international conventions binding State Parties. In particular, the amnesty laws are contrary to the principles enshrined in such international treaties as the Convention on the Prevention and Punishment of the Crime of Genocide, the Inter-American Convention to Prevent and Punish Torture, the Convention against Torture, and the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance. These treaties oblige State Parties to punish the perpetrators of the crimes forbidden by the treaty. For example, the Convention Against Torture requires a State Party to prosecute an individual who has committed or participated in torture (Article 6). Under the rationale of this decision, laws granting amnesty to perpetrators of torture or other crimes included in the above-mentioned treaties violate international law because they prevent authorities from prosecuting these criminals.

Judge Luna also held that *Obediencia Debida* and *Punto Final* are contrary to the spirit of the legal rules recognized by the international community; therefore, grants of amnesty for such crimes are prohibited. He concluded that the norms of international law that impose an affirmative obligation to investigate, prosecute, and punish these alleged crimes are *jus cogens* (peremptory norms that do not recognize any opposing normative limitation). Therefore, international law does not protect persons accused of these crimes from the jurisdiction of the international community.

Retroactivity Analysis

In his defense, Cavallo argued that the Spanish universal jurisdiction law was enacted after the alleged commission of the crimes and that consequently, Mexico could not extradite him for crimes that pre-date the Spanish law. In addressing the allegation of illegal retroactivity—the prohibition of *ex post facto* criminal legislation—the Mexican judge ruled that Spanish Courts are competent to hear the case and that the non-*ex post facto* rule does not apply because already existing international treaties prohibited the crimes before the defendant allegedly committed them. Furthermore, the judge held that jurisdictional laws are procedural, not substantive, and that the rule of non-retroactivity does not apply to rules of procedure. Citing past Mexican jurisprudence, the judge ruled that it was not a valid argument to deny the extradition of Cavallo on the grounds that the Spanish jurisdictional law was enacted after the alleged commission of the crimes.

The decision of the District Judge was essential in recognizing the principle of universal jurisdiction in Mexico. Unfortunately the decision did not go far enough because it decided against extradition for the crime of torture on the grounds that the statute of limitations regarding this charge had expired. The decision is in error insofar as the indictment categorized torture as a crime against humanity and therefore no statute of limitations should apply.

The Decision of the Foreign Affairs Ministry and the Inclusion of Torture Charges

In Mexico, the decision of a judge to grant or deny extradition is not binding on the executive branch. According to Articles 29 and 30 of the *Ley de Extradición Internacional* (International Extradition Law), the Ministry of Foreign Affairs ultimately decides whether the extradition should take place, taking into account existing treaties, the judicial record, the legal opinion of the judge, and prudential considerations in the conduct of foreign policy. On February 2, 2001, Mexican Foreign Secretary Jorge Castañeda decided that in the present case, the extradition of Ricardo Miguel Cavallo should proceed for the crimes of genocide and terrorism as well

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as torture, despite the previous decision of the judge that the latter crime was subject to statutory limitations.

Castañeda's decision is a correct interpretation of the rationale of Judge Luna. In addressing the Argentine impunity laws, Judge Luna held that the international community must not recognize internal provisions, such as amnesties or other laws designed to impede international justice, because the interests of the international community in general, and of the victims of the crimes in particular, transcend any particular or national interest of a State. The same reasoning applies to laws that impose statutes of limitations based on the passage of time, like the Mexican law that allows statute of limitations to run for torture. There might be a conflict if the rules that impose a statute of limitations were set in the constitution. Statutory limitations, however, are not contemplated in the Mexican constitution, but are provided for only in secondary laws such as the criminal code (Articles 100 to 115). Thus, the provision of Article 6 of the Convention Against Torture creating the obligation to prosecute or extradite (*aut dedere aut judicare*) when an alleged torturer is under the jurisdiction of a State Party preempts the secondary internal rule that Judge Luna applied.

In addition, Mexico signed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on July 3, 1969, years before the alleged commission of Cavallo's crimes. This Convention provides in Article 1 that no statutory limitation shall apply to war crimes or crimes against humanity irrespective of the date of their commission. Under Article 18 of the Vienna Convention on the Law of Treaties, Mexico has an international obligation not to defeat the object and purpose of the treaty. In the present case, the object and purpose of the Convention on the Non-Applicability of Statutory Limitations is to punish such crimes regardless of internal rules on statutory limitations and irrespective of the date of their commission. Here, torture fits under the rubric of crimes against humanity and, as such, no statutory limitations apply. Fortunately, the Ministry of Foreign Affairs amended the mistake of the Judge Luna, avoiding Mexico's potential breach of its international obligations.

The Amparo or Habeas Corpus Proceedings

After the decision of the Ministry of Foreign Affairs, Ricardo Miguel Cavallo filed a writ of *habeas corpus* against this decision before another federal judge. In Mexico, *habeas corpus* is contemplated under the broader writ of *amparo*, which applies to any decision of an administrative agency that may affect a constitutional right. In the Cavallo case, the *amparo* proceedings before the federal district court are currently pending, and it will likely go to the Supreme Court if it considers the case of institutional importance.

It is important to note that *habeas corpus* or *amparo* proceedings in Mexico are not an appeal against previous decisions; instead they constitute independent trials to review the constitutionality of administrative acts—in this case the extradition decision. The importance of this lies with the fact that the Supreme Court is called upon to decide whether the extradition process was done in accordance with the Mexican constitution. In this case, the issues raised by constitutional standards are intimately related to the manner of incorporation of international treaty obligations into domestic law. Thus, the eventual outcome of the Cavallo case in Mexico will have enormous repercussions as a matter of constitutional, international, and even comparative law. The ultimate fate of Cavallo lies in the federal courts' decision. All of us should stay tuned. ☺

**Juan E. Méndez is Professor of Law and Director of the Center for Civil and Human Rights at Notre Dame Law School. He is also a member of the Inter-American Commission on Human Rights and an alumnus of the Washington College of Law (1981). Salvador Tinajero-Esquivel is an LL.M. candidate at Notre Dame Law School.*



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21, and 25 of the American Convention. The Commission asked the Inter-American Court to order Nicaragua to pay reparations to the Awas Tingni in accordance with Article 63.1 of the Convention. Under this article, if a State is found responsible for violating the Convention, the Inter-American Court may order the State to take any and all measures to ensure the negative consequences of the violation are redressed. In the Awas Tingni case, the Commission asked that Nicaragua be required to demarcate the territorial boundaries of its indigenous populations and to abstain from granting licenses allowing the use or removal of natural resources from the Awas Tingni land until the precise demarcation has taken place.

As part of Nicaragua's restitution to the Awas Tingni, the Commission requested that the government provide compensation, both material and moral, for the suffering the community experienced as a result of the State's actions. The Commission also requested the State pay for the legal expenses incurred by the Awas Tingni to defend themselves in Nicaragua, before the Commission, and before the Inter-American Court.

The Importance of this Case

This is a landmark case in the Inter-American System for the Promotion and Protection of Human Rights. It is the first case

brought before the Inter-American Court concerning the rights of an indigenous population. It is appropriate that the first such case should examine the property rights of an Indian group because the very culture and existence of the Indian community depends upon the land on which they reside.

This case is also important because it shows the value of the Inter-American System as an avenue to debate (and hopefully settle) very important and complex legal matters. Nicaragua participated fully in the proceedings, showing the vitality of the Inter-American System's framework. Also, Nicaragua's active participation renders illegitimate any later non-compliance with the Inter-American Court's decision by the government. For the Awas Tingni, this case also opens up the possibility to achieve justice and to establish principles that will help not only their community, but also establish precedent for future cases involving the rights of indigenous peoples.

The Commission expects a ruling from the Inter-American Court on the case of *Awas Tingni v. Nicaragua* by the end of 2001. ☺

**Claudio Grossman is Dean of the Washington College of Law, a Co-Director of the Center for Human Rights and Humanitarian Law, and President of the Inter-American Commission on Human Rights.*